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No. 97-454

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

UNITED STATES OF AMERICA,

Petitioner,

v.

BESTFOODS (FORMERLY CPC INTERNATIONAL INC.), *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF AMICUS CURIAE OF THE UNITED STATES BUSINESS & INDUSTRIAL COUNCIL IN SUPPORT OF RESPONDENTS

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The United States Business & Industrial Council ("USBIC"), as amicus curiae, respectfully submits this brief in support of Respondents CPC International Inc.,[1] Aerojet-General Corporation, Cordova Chemical Company, and Cordova Chemical Company of Michigan, pursuant to Rule 37.3 of the Supreme Court Rules. By letters filed with the Clerk of the Court, the parties have consented to the filing of this brief.

INTEREST OF AMICUS CURIAE

USBIC is a 65-year-old nonprofit business league and policy center headquatered in Washington, D.C. USBIC's approximately 1,100-firm membership spans 44 states and ranges from Fortune 500 corporations to small entrepreneurial enterprises. Drawn from the manufacturing, energy, real estate and financial services sectors of the national economy, these companies are generally major employers in their communities and mainstays of local economies. USBIC has consistently promoted a less intrusive government, adoption of market-oriented regulatory solutions, and fiscal responsibility.

The issues presented in this case arising under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended ("CERCLA"), are of particular concern to USBIC's members and directly affect USBIC's longstanding mission. The continuing success of the American free enterprise system depends closely on the innovation, drive, vision, and hard work of entrepreneurs and incorporators. The limited liability corporate form has created more jobs,

[1] While USBIC understands that CPC International Inc. may now be known as "Bestfoods", throughout this brief the company will be referred to as "CPC."

*No counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus curiae* or its members made a monetary contribution to the preparation or submission of this brief.

income, wealth, economic growth and opportunity than any other organizational form in history.

The decision of the United States Court of Appeals for the Sixth Circuit now before this Court supports the well-established concept of limited corporate liability, on which USBIC's members have long relied. The Sixth Circuit's opinion provides a sense of balance, integrity and legitimacy to environmental statutory and regulatory enforcement, by rejecting the government's nearly boundless views on the scope of environmental liability. The decision of the Sixth Circuit also respects the indispensable role of state law, under which many of USBIC's members have been incorporated, in determining what is – and what is not – a corporation and the circumstances under which a corporate form may be disregarded. The Sixth Circuit's opinion promotes good corporate citizenship, by encouraging parent corporations to become and remain involved in subsidiary corporations and not to distance themselves from the environmental compliance activities of related corporations. Finally, USBIC strongly believes that the standard of liability under CERCLA urged by Petitioner United States of America ("Petitioner") represents such a dramatic departure from current economic realities and business expectations that such a standard should not be judicially imposed.

SUMMARY OF ARGUMENT

Since CERCLA's enactment, the courts have cast an exceedingly confused web of interpretation over the statutory text. Particularly in the area of corporate liability, and as was the case with the district court below, judges have interwoven concepts of direct liability with selected

principles of vicarious liability to create "new, middle ground" for finding CERCLA liability. *CPC International, Inc. v. Aerojet General Corp.*, 777 F. Supp. 549, 573 (W.D. Mich. 1991) (Petitioner's Appendix ("Pet. App.") at 107a).[2] The result is a judge-made, conceptual "grab-bag" that dramatically expands the scope of CERCLA liability, taking it even further out of balance with the exceedingly powerful remedies Congress created for those who successfully invoke the statute. Thus, USBIC urges the Court to affirm the Sixth Circuit's decision, and hold that a parent corporation may not be held liable under CERCLA section 107(a)(2) as an "operator" of a facility owned or operated by a subsidiary corporation absent the existence of circumstances warranting piercing the corporate veil under applicable state law.[3]

A. When it enacted CERCLA, Congress identified four bounded categories of potentially liable persons and no others. 42 U.S.C. §9607(a). The legislative determination to restrict liability to these discrete categories of persons was well founded, because the courts later held it was Congress' intent to make liability under the statute strict, as well as joint and several. *See, e.g., United States v. Colorado & Eastern R.R. Co.*, 50 F.3d 1530, 1535

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[2] *See also, United States v. Kayser-Roth Corp.*, 910 F.2d 24, 26-27 (1st Cir. 1990), *cert. denied*, 498 U.S. 1084 (1991); *Schiavone v. Pearce*, 79 F.3d 248, 253-54 (2d Cir. 1996); *Lansford-Coaldale Joint Water Auth. v. Tonolli Corp.*, 4 F.3d 1209, 1221-23 & n.13 (3d Cir. 1993); *United States v. TIC Investment Corp.*, 68 F.3d 1082, 1089-91 (8th Cir. 1995), *cert. denied*, 117 S.Ct. 50 (1996); *Jacksonville Elec. Auth. v. Bernuth Corp.*, 996 F.2d 1107, 1110 (11th Cir. 1993).

[3] USBIC supports the Sixth Circuit's decision that parent corporations may not be liable under CERCLA section 107(a)(2) unless circumstances requiring piercing of the corporate veil exist as applied by the Sixth Circuit to CPC and Aerojet-General Corporation, and as a general rule.

(10th Cir. 1995). The liability of "owners," "operators," "arrangers," and "transporters" arises from their direct and actual relationship with a facility where hazardous substances have been released into the environment. 42 U.S.C. §9607(a).

In this case involving the contours of "operator" liability under CERCLA, the *en banc* opinion of the Sixth Circuit acknowledges that any "operator" with such direct involvement with the facility in question may be liable. Pet. App. at 17a-18a. Contrary to Petitioner's contention that the Sixth Circuit's opinion "absolves parent corporations of liability," Brief of Petitioner United States ("Pet. Br.") at 16, the decision *maintains* full liability under CERCLA for parent corporations that effectively operate, through sham subsidiaries, facilities where hazardous substances have been released into the environment. Pet. App. at 17a-18a. The Sixth Circuit's opinion merely reaffirms Congress' intention – expressed in the plain words of the statute – that parent corporations are not liable as operators under CERCLA merely because they may exercise "control" over viable subsidiary corporations. The object of "operator" conduct triggering liability is a facility, not another firm.

B. The courts imposing "direct" operator liability in disregard of the corporate form have typically engaged in a truncated vicarious liability analysis *sub silentio*. Relying on factual conclusions about the percentage of subsidiary stock owned by the parent, involvement with the subsidiary's board of directors, and inter-corporate policy-setting arrangements, the district court's opinion in this case is representative of this abbreviated derivative liability analysis masquerading as a test for "direct" liability.

Because corporations are creatures of state law, issues concerning a corporation's formation, organization, constitution, governance, viability, and formal existence turn on the law of the incorporating jurisdiction. CERCLA's structure and text reflect Congress' intent to look to state law in determining whether, and under what circumstances, a state law-created corporation may nonetheless be disregarded in favor of holding another party, with no direct ties to the facility in question, vicariously liable for the disregarded corporation's actions.

Petitioner argues that the Court effectively should read into CERCLA's text phrases like "active participation" and "control." The transparent objective of such additions to the legislated words is to supplant the well developed body of state law that routinely guides the courts in determining when the corporate veil is to be pierced. Similarly, by giving the label "direct liability" to conduct that is normally one of many factors weighed to determine vicarious liability, Petitioner plainly seeks to avoid the common law factors historically applied to determine whether the separate existence of a corporation should be recognized or disregarded.

C. Nowhere in CERCLA's structure or text did Congress manifest a clear intention to ignore or preempt state law on the scope of parent corporate liability. Nor does the statute suggest it was Congress' aim to commission federal courts to develop a body of federal common law on the subject of what is, and what is not, a viable corporation for purposes of imposing liability under CERCLA. Under this Court's decision in *United States v. Kimbell Foods, Inc.*, 440 U.S. 715 (1979), this determination is not a matter of federal common law. This is so because the federal interest in a uniform federal rule of parent corporate liability under CERCLA is weak, application of state law-based limited liability would not frus-

trate CERCLA's purpose, and derogation of well-established state veil-piercing standards would disrupt everyday commercial relationships founded on those standards.

D. The inescapable effect of Petitioner's argument is that, at least for the special purpose of imposing liability under CERCLA, the liability limits that customarily insulate owners of valid corporations are not so limited after all. It is the province of Congress only to consider and undertake such a dramatic change in fundamental principles of corporate law, organization and governance. Because the wholesale expansion of parent corporate liability urged by Petitioner would carry a substantial environmental and economic price, the legislature is better suited than the courts to weigh those costs against the purported benefits Petitioner asserts will accrue if its construction of the statute is adopted.

ARGUMENT

A. The Sixth Circuit Correctly Applied the Plain Language of CERCLA to Hold that Direct Liability is Applicable Only to the Entity Which Actually Operated the Facility.

CERCLA establishes four specific categories of "covered persons" and imposes liability only on persons who fall within those categories. 42 U.S.C. §9607(a). That Congress elected to limit CERCLA's reach to these discrete categories makes sense because liability under the statute has been held to be strict, as well as joint and several. *See, e.g., United States v. Colorado & Eastern R.R. Co.*, 50 F.3d 1530, 1535 (10th Cir. 1995). Indeed, CERCLA affords exceedingly powerful remedies to parties who successfully invoke it. *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 11, 21, (1989). Petitioner now seeks to

expand the already broad and powerful liability provisions of CERCLA far beyond reason and Congress' intent.

At issue in this case is the category that establishes CERCLA liability for "person[s] who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of." 42 U.S.C. §9607(a)(2). With respect to so-called "operator" liability, the statute imposes liability only on a party that can be shown to have operated the facility itself. Stated differently, the putative operator's ties to the facility must be actual and direct. Nothing in the statute remotely suggests liability attaches merely because one firm operates another firm which, in turn, operates a facility. Indeed, the statute elsewhere defines an "owner or operator" as the person "owning or operating *such facility.*" 42 U.S.C. §9601(20)(A)(ii)(emphasis added). CERCLA's plain language confirms Congress' design that the object of an operator's conduct giving rise to liability under CERCLA must be the facility, not merely another alleged operator.

Petitioner's attempt to shift the inquiry from actual "operation" of a contaminated facility to "control" or "management" of a related firm is not supported by the statute. In the primary liability provision of the statute, Congress used the word "operated," not "controlled" or "managed." 42 U.S.C. §9607(a)(2). In the definition of "owner or operator," Congress used the terms "otherwise control" and "participate in management" to address very specific situations not applicable here. If the terms were at all synonymous, Congress simply could have continued to use "operate" to capture all forms of activity giving rise to potential liability.

"Control" is only relevant where a facility has been conveyed to a governmental authority through abandon-

ment, bankruptcy or the like. 42 U.S.C. §9601(20)(A)-(iii). Congress provided that in such situations, an owner or operator is anyone "who owned, operated, or otherwise controlled activities at such facility" immediately before the conveyance. If "control" were synonymous with "operate," the language "or otherwise controlled" would be superfluous, an interpretive result to be avoided. *See, e.g., Weinberger v. Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 683 (1973). The fact that Congress used the term "otherwise controlled" in this context, but omitted it from the more generally applicable subsection of the definition (42 U.S.C. §9601(20)(A)(ii)), indicates that control is irrelevant to operator determinations in general. *Joslyn Mfg. Co. v. T.L. James & Co.*, 893 F.2d 80, 83 (5th Cir. 1990), *cert. denied*, 498 U.S. 1108 (1991); *United States v. Dart Industries, Inc.*, 847 F.2d 144, 146 (4th Cir. 1988).

Likewise, "management" is relevant only in one limited situation, not present in this case. In defining "owner or operator," Congress expressly provided that "such term does not include a person, who, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility." 42 U.S.C. §9601(20)-(A). Stated differently, a person who is the title owner of a facility (and so would be liable as an owner) is exempted from liability provided he does not "participate in management" of the facility.

Contrary to Petitioner's contention, the CERCLA liability of lenders who "participate in management" of a facility is not analogous to the operator liability of a parent who participates in the management of its subsidiary. Pet. Br. at 23. Lenders are liable for participation in the management of a *facility*, not in the management of borrower *firms*. 42 U.S.C. §9601(20)(F)-(i).

If "operate" were synonymous with "participate in management," as Petitioner contends, Congress could simply have again used the word operate. Yet Congress chose to use different language and to set a different standard for the exemption of certain lenders. "Participation in management" determines whether one who is already liable as an owner is nonetheless entitled to an exemption from the liability. The term at issue here – "operate" – governs whether liability attaches at all. The question, then, is not whether an otherwise liable person is entitled to an exemption but whether a parent corporation, which does not own the facility, is liable in the first place as an operator. Congress intended different standards as evinced by its use of different language even within the same definitional section.[4]

The Sixth Circuit properly rejected Petitioner's effort to use "control" or "management" as a proxy for "operate." The term "operate," with its connotations of physical presence and participation in the day-to-day mechanics of a process, is the word chosen by Congress to trigger liability. For a parent corporation, shareholder, or anyone else to be held directly liable under CERCLA

[4] Petitioner attempts to equate the standards by assuming precisely what is at issue, namely whether a parent corporation is an operator. Petitioner assumes that CPC is an operator and then suggests that parent corporations should not be permitted to escape liability by hiding behind its lack of ownership of the facility. In this vein, Petitioner correctly points out that CERCLA imposes liability, in the disjunctive, on owners *or* operators. Pet. Br. at 21. Of course, the real question is not whether a parent corporation is exempted from CERCLA liability, by virtue either of its non-ownership or based on state law-inspired limited liability principles, but whether it is liable in the first place.

it must actually *operate* the *facility*. 42 U.S.C. §9607(a). As noted by the Sixth Circuit, a parent corporation could thus be liable if it operated the facility "in the stead of its subsidiary; or, as a sort of joint venturer. . . ." *United States v. Cordova Chem. Co. of Mich.*, 113 F.3d 572, 579 (6th Cir. 1997) (Pet. App. at 12a). Absent such actual, physical and direct operation of a contaminated facility, the plain language of the statute precludes a parent corporation from being held directly liable as a CERCLA operator.

B. The Sixth Circuit Correctly Held that Vicarious Liability Under CERCLA Should Be Determined According to Traditional Principles of Corporate Law.

1. The District Court's Decision Has the Effect of Imposing Vicarious Liability on Parent Corporations.

Even as they insist that parent corporations and shareholders can be "directly" liable under CERCLA, the courts imposing liability in disregard of the corporate form actually have engaged in a derivative liability analysis.[5] Such courts typically have engaged in at least some examination of the relationship between the target corporation or shareholder and the actual owner of the facility.[6] Indeed, the district court in this case held that

> a parent corporation is directly liable under section 107(a)(2) as an operator only when it has exerted power or influence *over its subsidiary* by actively participating in and exercising control *over the subsidiary's business* during a period of disposal of hazardous waste. A parent's actual participation in and control *over a subsidiary's functions and decision-making* creates 'operator' liability under CERCLA. . . ."

Pet. App. at 107a (emphasis added).

[5] *See, e.g., United States v. Kayser-Roth Corp.*, 910 F.2d 24, 26-27 (1st Cir. 1990); *Schiavone v. Pearce*, 79 F.3d 248, 255 (2d Cir. 1996); *Lansford-Coaldale Joint Water Auth. v. Tonolli Corp.*, 4 F.3d 1209, 1221 (3d Cir. 1993).

[6] *Id.*

Thus, the district court held CPC liable not because the corporation itself was operating the facility, but because it actively managed its subsidiary. This is classic vicarious liability. The district court deemed the parent corporation to be the operator of the facility through its subsidiary, and charged the parent with legal responsibility for the acts or omissions of the subsidiary.

That the district court was actually imposing vicarious liability rather than direct liability is further reflected in the factors cited as relevant by the court. In imposing liability, the court pointed to its findings that the parent owned 100% of its subsidiary's stock, participated in its subsidiary's board of directors, set policies for the subsidiary, and controlled the subsidiary's budget. Pet. App. at 16a-17a. These factors all focus on the relationship between the parent and its subsidiary, rather than on the parent corporation's direct involvement in or relationship with the facility itself. These factors are aimed at determining whether the parent exercised an excessive amount of control over the subsidiary, such that it should be charged with vicarious liability for the conduct of its subsidiary.

In sum, the district court incorrectly concluded that a parent corporation in merely overseeing its subsidiary's activities acts directly, rather than vicariously, vis-a-vis a facility. The mistaken assumption led to the misapplication of selected factors for establishing vicarious liability, all under the guise of imposing direct liability.

2. The District Court Improperly Preempted Traditional Principles of Vicarious Liability.

As discussed above, the common law has developed principles of limited corporate liability, as well as standards for imposing vicarious liability in factual circumstances that warrant disregarding the corporate form. By labeling the parent's oversight activities as "direct," the district court sidestepped those traditional standards and created a self-proclaimed "new, middle ground" test for determining when liability attaches under CERCLA. What the district court did in creating this new test was to borrow selectively from a few of the traditional standards for imposing vicarious corporate liability and ignore others altogether. The result is a substantial lowering of the common law threshold for imposing vicarious liability.

Such selective preemption of established state corporations law lacks any support or justification, and certainly was not authorized by Congress when it enacted CERCLA. In fact, in several provisions in the statute Congress indicated its express intent that CERCLA not preempt established state law. *See* 42 U.S.C. §§9614(a) and 9652(d). One indication of Congress' intent to adopt, not supplant, state corporations law was its inclusion of the very term "corporation" within CERCLA's definition of "person." *See* 42 U.S.C. §9601(21). Congress did so without altering, explaining or defining what it means to be a "corporation." This is further evidence that Congress plainly adopted the body of state law which creates, authorizes and governs corporations in fashioning the contours of liability under CERCLA. The strained reading of CERCLA urged by Petitioner depends entirely on the implausible notion that Congress looked to state law to determine what a

"corporation" is, only to ignore state law in determining whether a "corporation" should be disregarded.[7]

Federal law cannot preempt state law unless it is the "clear and manifest" purpose of Congress to do so. *See, e.g., City of Milwaukee v. Illinois*, 451 U.S. 304, 316 (1981); *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 605 (1991). Certainly Congress manifested no such purpose to supplant state corporations law in enacting CERCLA.

Indeed, to preempt state corporations law by imposing CERCLA liability without regard to state limited liability principles would be inconsistent with the policies and objectives of the statute. Petitioner contends in effect that CERCLA's core purpose is to preserve and replenish the "Superfund" by reaching the broadest possible swath of potentially responsible parties capable of reimbursing the government for clean-up expenses. The courts have given some recognition to this statutory purpose. *In re Chicago, Milwaukee, St. Paul & Pac. R.R.*, 974 F.2d 775, 779 (7th Cir. 1992); *United Technologies Corp. v. EPA*, 821 F.2d 714, 722 (D.C. Cir. 1987). There is more to CERCLA, however, than replenishment of the Superfund. In enacting the statute, it was equally important to encourage private par-

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[7] That Congress knew how to preempt state law where it wanted to is seen in its modification of the term "owner." Like "corporation," the term "owner" is defined by state, rather than federal law – who holds title and, therefore, ownership is a matter of state law. But Congress expressly altered state property law to provide that if a person holds indicia of ownership primarily to protect its security interest, it is not an "owner" under CERCLA, even though it would otherwise be an "owner" as defined by state property law. *See* 42 U.S.C. §9601(20)(A). No such express preemption of state corporations law appears anywhere in the statute or its legislative history.

ties voluntarily to cleanup sites where hazardous substances have been released. H.R. Rep. No. 253, 99th Cong., 1st Sess. (1985) ("It is the intent of this Committee to encourage private party cleanup at all sites."). If parent corporations are deemed liable merely because they "actively participate in" or "directly control" the subsidiary companies through ordinary conduct aimed at safeguarding their investments, the inevitable result will be to discourage inter-corporate investment in firms facing environmental exposure, to raise the costs of capital for such firms, and thus to constrain the availability of resources for voluntary environmental remediation. Pet. App. at 14a.

Indeed, the distortion of CERCLA urged by Petitioner would result in passive investing becoming the norm. Parent corporations would abstain from setting environmental compliance policies and from overseeing the environmental remediation activities of their subsidiaries, precisely to avoid the types of inter-corporate involvement that could trigger CERCLA liability. Thus, the statutory construction advanced by Petitioner would, at once, perversely place additional strains on scarce Superfund resources, as well as undermine the goal of encouraging private parties to take affirmative steps to cleanup hazardous waste sites.

3. Petitioner's Novel Theory of "Direct" Parent Corporate Liability for Subsidiary Corporate Agents is Without Merit.

Petitioner carelessly suggests that "direct" CERCLA operator liability attaches to a parent corporation under common law principles of *respondeat superior*, when a parent's officers and directors also serve in the management and on the board of the subsidiary enterprise actually operating a CERCLA facility. Pet. Br. at 33-34 and

n.19. Because "[a] corporation is responsible for the wrongs committed by its agents in the course of its business," Petitioner contends the parent is "directly" liable for the acts or omissions of such "dual-hatted" agents. As Petitioner would have it, commonality of officers and directors between parent and subsidiary corporations would *ipso facto* result in liability for the parent, because the parent is always *vicariously* liable for the acts of its employees. Pet. Br. at 33-34.

The law does not support Petitioner's mixture of direct and vicarious liability principles. First, such a rule would effectively eviscerate the common law of veil-piercing. The courts have consistently acknowledged, both in CERCLA and non-CERCLA contexts, that commonality of officers and directors is itself insufficient to attribute to a corporate parent the liabilities of its subsidiary.[8] Second, such a rule would gloss over entirely the facts of each case. Precisely when parent corporate officers, who also serve in subsidiary management, are acting within or without the scope of their duties to the parent corporation is a necessarily fact-bound, case-specific inquiry. Petitioner's novel *per se* rule is without any legal reason or support, and would result in grave injustices.

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[8] *See, e.g., United States v. TIC Investment Corp.*, 68 F.3d 1082, 1092 (8th Cir. 1995), *cert. denied*, 117 S.Ct. 50 (1996) ("The mere fact that . . . individuals who were officers and directors of [parent corporations] concurrently served as officers and directors for [subsidiary corporation] does not, in and of itself, tend to establish the [parent corporation's] liability."); *Johnson v. Flowers Industries, Inc.*, 814 F.2d 978, 982 (4th Cir. 1987); *United States v. Jon-T Chemicals, Inc.*, 768 F.2d 686, 691 (5th Cir. 1985), *cert. denied*, 475 U.S. 1014 (1986).

C. The Sixth Circuit Properly Concluded that State Veil-Piercing Law Applies in Determining Whether a Parent Corporation Should be Held Liable Under CERCLA Section 107(a)(2).

The Sixth Circuit correctly applied state law principles of veil piercing in determining the liability of parent corporations as "operators" under CERCLA section 107(a)(2). In so doing, the Sixth Circuit appropriately rejected any suggestion that Congress intended to empower federal courts to develop a body of federal common law on this subject. The Sixth Circuit's decision is also consistent with the plain language of CERCLA and the three-factor test pronounced by this Court in *Kimbell Foods*, concerning the circumstances under which state law should be applied under federal programs.

1. Plain Language of CERCLA and Congress' Intent.

The "normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific." *Midlantic Nat'l Bank v. New Jersey*, 474 U.S. 494, 501 (1986). In the case of CERCLA, nothing in the text of the statute or in its legislative history provides any indication that Congress intended to supplant traditional state corporate laws governing parent liability. "CERCLA does not define . . . 'operators' as including the parent company of offending wholly owned subsidiaries. Nor does the statute's legislative history indicate that Congress intended to alter so substantially a basic tenet of corporation law." *Joslyn Mfg.*

Co., 893 F.2d at 82.[9] As the Sixth Circuit concluded in this case, "if Congress wanted to extend liability to parent corporations it could have done so, and it remains free to do so." Pet. App. at 14a.

2. *Kimbell Foods* Supports Deference to and Adoption of State Corporations Law.

It is well established that "[c]ontroversies directly affecting the operations of federal programs, although governed by federal law, do not inevitably require resort to uniform federal rules." *Kimbell Foods*, 440 U.S. at 727-28); *see also Anspec Co. v. Johnson Controls, Inc.*, 922 F.3d 1240, 1250 (6th Cir. 1991) (Kennedy, J., concurring).[10] On the contrary, federal law can and appropriately should adopt and incorporate state law rules under certain circumstances. As this Court has observed, the decision to "adopt state law or to fashion a nationwide federal rule is a matter of judicial policy 'dependent upon a variety of considerations always relevant to the nature of the specific governmental interests and to the effects upon them of applying state law.' " *Kimbell*

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[9] Several courts have held that, in considering whether to apply state law in similar contexts under CERCLA, the statute does not override traditional principles of state law. *See, e.g., United States v. USX Corp.*, 68 F.3d 811, 824 (3rd Cir. 1995) (CERCLA's language "fails to indicate that traditional concepts of limited liability are to be disregarded"); *City Management Corp. v. U.S. Chem. Co.*, 43 F.3d 244, 250 (6th Cir. 1994) (the liability of a successor corporation for CERCLA obligations is determined by reference to state law).

[10] This conclusion is also supported by the Rules of Decision Act: "The laws of the several states, except where Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply." 28 U.S.C. §1652.

Foods, 440 U.S. at 728 (quoting *United States v. Standard Oil Co.*, 332 U.S. 301, 310 (1947)).

The first step in evaluating whether to apply state law or to fashion a federal common law rule of decision is to look to the language of the federal statute to determine Congress' intent. *Mardan Corp. v. C.G.C. Music, Ltd.*, 804 F.2d 1454, 1458 (9th Cir. 1986) (citing *Kimbell Foods*, 440 U.S. at 740). "Whether latent federal power should be exercised to displace state law is primarily a decision for Congress . . . ." *Atherton v. Federal Deposit Ins. Corp.*, 117 S.Ct. 666, 670 (1997). In the case of CERCLA, nothing in the statute's text or legislative history provides any indication that Congress intended to supplant traditional state corporations law with a new, uniform federal common law rule for operator liability.

"It is precisely when Congress has not spoken," that it is up to the federal courts to fill in the gaps of federal legislation "according to their own standards." *Kimbell Foods*, 440 U.S. at 727. This does not mean, however, that the federal courts are free to formulate a uniform federal common law rule to fill those gaps. *Id.* at 727-28; *Camps Newfound/Owatonna, Inc. v. Town of Harrison, Maine*, 117 S.Ct. 1590, 1617-18 & n.9 (1997) (Thomas, J., dissenting). Rather, resort must be made to the stringent choice-of-law inquiry set forth in *Kimbell Foods*, to determine whether the courts are permitted to develop a uniform federal common law rule or, instead, are to adopt state law as the applicable federal rule of decision.

Kimbell Foods establishes the following three factors to guide the courts in determining whether federal common law or applicable state law should bridge the choice of law gap in a federal statute: (1) whether the matter

requires a nationally uniform body of law; (2) whether the application of state law would frustrate special objectives of the federal program; and (3) whether application of a federal rule would disrupt commercial relationships predicated on state law. 440 U.S. at 728-29. This test should be applied against the backdrop of this Court's determination that the circumstances justifying judicial creation of a special federal rule are "few and restricted," and are limited to situations where there is a "significant conflict between some federal policy or interest and the use of state law." *O'Melveny & Myers v. Federal Deposit Ins. Corp.*, 512 U.S. 79, 87 (1994).

Application of the three-part *Kimbell Foods* inquiry to the present controversy compels the conclusion that state law is to provide the controlling rule of decision for determining when parent corporations should be held liable as operators under section 107(a)(2) of CERCLA. All three of the *Kimbell Foods* factors support the application of state law in this context.

a. No Substantial Need Exists for a Uniform Body of Law on Parent Corporate Liability Under CERCLA.

Any need for a nationally uniform body of law to determine parent corporation liability under section 107(a)(2) is not substantial enough to warrant the judicial, rather than legislative, creation of such a body of law. Initially, as this Court has recognized, the federal interest in uniformity is the "most generic and lightly evoked" of all potentially alleged federal interests. *O'Melveny & Myers*, 512 U.S. at 88. In any event, however, the vicarious liability of parent corporations under CERCLA can properly be decided under state law without resort to a uniform federal common law rule. State law already provides for imposition of liability on cor-

porate owners through the well-established and often-applied doctrine of piercing the corporate veil. Under this doctrine, state law provides no refuge for parent corporations, especially when their subsidiaries are nothing more than the "alter ego" or "mere instrumentality" of the parent, or the corporate form has been used to perpetuate a fraud or injustice.

The federal interest in a uniform rule of decision is especially weak where, as here, the federal remedial statute has been interpreted to provide for strict, as well as joint and several liability. Since liability is joint and several under CERCLA, governmental and private litigants can recover fully on their claims, provided there is one solvent defendant. Therefore, this is not an instance where the undisputed federal interest in full recovery of remediation costs will be prejudiced by any slight variations in state corporations law and corporate veil-piercing tests. *See Atherton*, 117 S.Ct. at 671 ("[t]o invoke the concept of 'uniformity' . . . is not to prove its need"). In short, the interest in uniformity factor of the *Kimbell Foods* test supports adoption of state law as the federal rule for parent corporation liability as an operator under CERCLA section 107 (a)(2).

b. Application of State Law Would Not Frustrate CERCLA's Objectives

The second factor in the *Kimbell Foods* test also militates in favor of adopting state law in this instance, because the application of state corporations law would not frustrate CERCLA's objectives. An actual conflict between a "specific, concrete federal policy or interest" and state law is a "precondition" to fashioning a federal common law rule. *O'Melveny & Myers*, 512 U.S. at 88. "Generalized pleas for uniformity" may not serve as a substitute for "concrete evidence that adopting state law

would adversely affect [federal interests]." *Kimbell Foods*, 440 U.S. at 730. Petitioner has failed to carry its heavy burden in proving a "significant conflict" between use of state corporations law as the proper federal rule of decision and CERCLA's dual objectives of promptly cleaning up hazardous waste sites and imposing the costs of cleanup on those responsible for the contamination. *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 7 (1989).

Congress "intended for CERCLA to cast a wide net of responsibility for the costs of environmental cleanup." Pet. App. at 26a. CERCLA does not require that federal law displace state laws governing the liability of corporate owners, however, unless such laws permit action prohibited by the statute or unless "their application would be inconsistent with the federal policy underlying the cause of action." *Anspec*, 922 F.2d at 1249-50 (Kennedy, J., concurring) (quoting *Johnson v. Railway Express Agency*, 421 U.S. 454, 465 (1975)). Petitioner cites as evidence, the blanket assertion by one of the dissenters from the Sixth Circuit's decision that "following state law in this area would allow corporations to easily evade their environmental responsibilities under CERCLA by incorporating subsidiaries in states with stringent standards for piercing the corporate veil." Pet. App. at 26a. This concern is ill founded, illusory and misplaced. The application of state corporate law in this context "poses no significant threat to any identifiable federal policy or interest." *Anspec*, 922 F.3d at 1250 (Kennedy, J., concurring).

As then-Circuit Judge Kennedy observed with respect to CERCLA, state law more than adequately addresses the abuse of the corporate form as a means of attempting to avoid liability:

> Any fears that states will engage in a "race to the bottom" in their effort to attract corporate business and enact laws that will limit vicarious liability are in my opinion groundless. States have a substantial interest in protecting their citizens and state resources. Most states have their own counterparts to CERCLA and the EPA and they share a complementary interest with the United States in enforcement of those laws like CERCLA that are used to remedy environmental contamination. I see no necessity to create federal common law in this area to guard against the risk that states will create safe havens for polluters.

Id.

Every state has clear and effective rules that permit government agencies and/or injured citizens to hold parent corporations liable as operators under CERCLA section 107(a)(2) when those corporations have abused the prerogatives of the corporate form. It cannot be said that these state laws operate to defeat CERCLA's goals.[11]

c. Application of Petitioner's Uniform Rule Would Substantially Disrupt Commercial Relationships Predicated on State Law.

The third factor identified by this Court in *Kimbell Foods* also calls for adopting state law for determining corporate owner liability under CERCLA section 107(a)-(2). This final prong of the choice of law inquiry "must

[11] Another potential justification for the invocation of a federal common law rule of decision regarding parent liability under CERCLA is to "enrich the fund" by imposing a more expansive approach to CERCLA liability that would permit the United States to "pick and choose" as to whether it wanted to proceed directly against corporate shareholders. Cf. *O'Melveny & Myers*, 512 U.S. at 88. This Court repeatedly has found such "more money" arguments to be unavailing. *Id.*; *Kimbell Foods*, 440 U.S. at 737-38.

consider the extent to which application of a federal rule would disrupt commercial relationships predicated on state law." *Kimbell Foods*, 440 U.S. at 728-29.

Implementing a federal common law rule that discards traditional principles of corporate limited liability would have an enormous impact on commercial relationships predicated on state law. The corporation is a mainstay of the country's economy. The limited liability protection the corporate form provides materially motivates investment and business decisions every day. Existing state laws provide ample government regulation of parent-subsidiary corporate relationships and strike the appropriate balance between limited liability and protection for those injured by corporate abuse. Moreover, corporate owners rely on these state laws. Because it strikes at the heart of the corporate form, applying the federal common law rule urged by Petitioner would disrupt "commercial relationships predicated on state law." In *Kimbell Foods*, this Court declined to "override intricate state laws of general applicability on which private creditors base their daily commercial transactions." 440 U.S. at 729. A similar result is warranted here.

D. The Sixth Circuit Correctly Applied State Law and Upheld Traditional Concepts of Limited Liability Associated with the Corporate Form.

The Sixth Circuit's decision was necessary to allow continued reliance on the fundamental principle of limited liability, which has been long recognized as a beneficial feature of corporations law in the United States. Additionally, it is for Congress, not the courts, to determine whether the far-reaching scope of liability urged by

Petitioner sufficiently advances the goals of CERCLA to warrant such a dramatic disruption of business and corporate relationships.

1. Limited Corporate Liability Has Been Long Recognized and Approved by This Court.

It is a long established, central feature of corporations law that the liability of corporate owners is limited to their stake in the venture, absent abuse of the corporate form. As one federal court commented, it is basic to the theory of corporations law that "a corporation is a separate entity, a legal being having an existence separate and distinct from that of its owners. This attribute . . . enables the corporation's stockholders to limit their personal liability to the extent of their investment." *Krivo Indus. Supply Co. v. National Distillers & Chem. Corp.*, 483 F.2d 1098, 1102 (5th Cir. 1973), *modified per curiam*, 490 F.2d 916 (5th Cir. 1974). Equally basic is the notion that the corporate form should not be lightly discarded, because "limited liability is one of the principle purposes for which the law has created the corporation." *Id.*[12]

In *Anderson v. Abbott*, 321 U.S. 349, 361 (1944), this Court recognized that: "[n]ormally the corporation is an

[12] As stated by future Justice William Douglas in 1929, "[l]imited liability . . . is ingrained in our economic and legal systems. The social and economic order is arranged accordingly. Our philosophy accepts it. It is legitimate for a man or group of men to stake only a part of their fortune on an enterprise. Legislatures, courts, and businesses have made it so." William O. Douglas & Carrol M. Shanks, *Insulation from Liability Through Subsidiary Corporations*, 39 Yale L.J. 193 (1929). Commentators today continue to express such views. *See, e.g.*, Frank H. Easterbrook & Daniel R. Fischel, *Limited Liability and the Corporation*, 52 Chi. L. Rev. 89 (1985) ("[l]imited liability is a fundamental principle of corporate law").

insulator from liability on claims of creditors." The Court affirmed the legitimacy of this feature of the corporate form, acknowledging that "the fact that incorporation was desired in order to obtain limited liability does not defeat this purpose." *Id.* The Court then proceeded to discuss the applicability of limited liability and the considerable benefits the doctrine provides, noting, "[l]imited liability is the rule not the exception; and on that assumption large undertakings are rested, vast enterprises are launched, and huge sums of capital attracted." *Id.* at 362.

2. The Sixth Circuit's Decision Affirms and Continues the Broadly Shared Benefits of Limited Liability.

The decision of the Sixth Circuit appropriately preserves the concept of limited liability for corporations and the associated benefits to this nation's economy. Business and the modern economy rely on and use the corporate form and the accompanying fundamental principle of limited liability in shaping everyday transactions. The economic benefits transmitted through a corporate law regime featuring limited liability are numerous and far-reaching. Extensive scholarly work has thoroughly compiled and analyzed the advantages provided by limited liability. *See generally*, Phillip I. Blumberg, *The Law of Corporate Groups: Tort, Contract, and Other Common Law Problems in the Substantive Law of Parent and Subsidiary Corporations* (1987); Easterbrook and Fischel, *supra*.

Limited liability has been termed "indispensable for an organized securities market," as it contributes to the creation of efficient capital markets in several different ways. *See* Blumberg, at §4.02. Limited liability

allows investors to participate in an organized liquid market without concern for the relative wealth of other investors. This lowers information costs and consequently improves efficiency of capital development. *Id.* at §4.02.5.

Limited liability provides many additional advantages. First, limited liability facilitates the operation of very large scale enterprises. Without limited liability, the exposure to the risk levels inherently present in such enterprises would discourage investment. *Id.* at §4.02.2. Second, limited liability encourages diversification by protecting investors. Under a system which does not feature limited liability, an investor could lose all assets upon the failure of a single investment. The rational business strategy under unlimited liability "would be to minimize the number of securities [or companies] held." Easterbrook, at 97. Limited liability removes the disincentive to diversify. Blumberg, at §4.02.3. Third, limited liability facilitates optimal investment decisions by encouraging investments in risky but beneficial ventures. Limited liability reduces inefficient behavior by ensuring that projects are not rejected where prospects for long term profitability exist. Blumberg, at §4.02.8. Finally, the extension of limited liability to parent corporations prevents organizations whose shareholders are other corporations from operating at a competitive disadvantage compared to organizations comprised of individual shareholders. Easterbrook, at 111.

Limited corporate liability is essential to the management and operation of corporations, the efficient operation of capital markets, and the profitable functioning of the modern economy. The Sixth Circuit was correct to weigh this essential, fundamental principle, in determining that Congress did not intend to dramatically

change the rules with regard to recognition of the corporate form when it enacted CERCLA.

3. Any Decision to Change Fundamentally Corporate Limited Liability is Properly a Matter Only for Congress.

Overturning the decision of the Sixth Circuit and tampering with the traditional concept of limited liability, as urged by Petitioner, would have many adverse and widely-felt consequences. In addition to being fundamentally wrong and unfair for corporate owners, Petitioner's standard would have dramatic effects on both the environment and the economy. Accepting Petitioner's argument that this Court hold parent corporations directly liable for the acts of subsidiaries would mark "a dramatic departure from traditional corporation law." *Joslyn Mfg. Co.*, 893 F.2d at 82. Such a significant change of course can only be sanctioned by Congress. As the *Joslyn* court held, "[a]ny bold rewriting of corporate law in this area is best left to Congress." *Id.* at 83.

a. Petitioner's Standard is Fundamentally Unfair.

Adoption of the standard of liability proposed by Petitioner would be fundamentally unfair to parent corporations. Traditional rules of limited liability influence countless business decisions every day, including decisions of parent corporations related to the level and nature of their involvement in subsidiary companies. Petitioner would impose liability on parent corporations for conduct that was lawful at the time it occurred and that falls far short of the behavior necessary to disregard the corporate form of subsidiary companies. Imposition of such liability would improperly and completely frustrate parent corporate reliance on the principle of lim-

ited liability and is, therefore, unfair. *National Labor Relations Bd. v. Greater Kansas City Roofing*, 2 F.3d 1047, 1052 (10th Cir. 1993) ("[w]here stockholders follow the technical rules that govern the corporate structure, they are entitled to rely on the protections of limited liability that the corporation affords").

b. Acceptance of Petitioner's Standard Would Have Adverse Environmental Consequences.

Adopting Petitioner's suggested standard of liability would also have adverse environmental consequences. A fundamental goal of CERCLA is to encourage voluntary cleanup of hazardous waste sites. H.R. Rep. No. 253, 99th Cong., 1st Sess. (1985) ("[i]t is the intent of this Committee to encourage private party cleanup at all sites"). Petitioner's proposed standard would have the opposite effect. Instead of encouraging voluntary participation in hazardous waste management and remediation, Petitioner's approach would encourage parent companies to adopt a "hands off" approach and to separate or distance themselves completely from any involvement with subsidiary companies facing potential environmental liabilities. As the Sixth Circuit concluded, "the threat of unlimited liability will likely deter private sector participation in the cleanup of existing sites." Pet. App. at 14a. In the absence of direct Congressional intent, this Court should not discard the "sensible and legitimate precautions" provided by traditional common law rules, since doing so would "actually contravene the public interest by discouraging businesses from being involved in" pollution prevention and remediation. *Id.* at 15a.

c. Acceptance of Petitioner's Standard Would Have Adverse Economic Consequences.

Adopting Petitioner's standard would also have adverse economic consequences in a broader sense, as well. First, exposing corporate owners of viable subsidiary companies to CERCLA liability would reduce, at the margin, any incentives to invest in industries which generate, either directly or indirectly, even small amounts of hazardous substances or wastes, no matter how beneficial the final product. Similarly, the virtually automatic extension of liability to parent corporations urged by Petitioner would negatively affect the efficiency of capital formation by imposing information gathering costs entirely out of line with investment risks and rewards. The consequent blurring of parent and subsidiary corporate forms would reduce investment transparency and create additional information asymmetries in financial markets. These forces would merely serve to raise the cost of capital with no discernible net environemntal benefit.

Each of the above-described consequences of the proposed discarding of traditional rules of limited corporate liability would be far-reaching and dramatic. As a result, any decision to impose the expanded standard of CERCLA operator liability proposed by the Petitioner invokes national policy implications which are a matter for Congress, rather than the Court, to decide. As this Court has previously stated, the function of weighing and appraising the costs of imposing new liability standards "is more appropriately for those who write the laws, rather than for those who interpret them." *O'Melveny & Myers*, 512 U.S. at 89.

CONCLUSION

For the foregoing reasons, USBIC urges the Court to affirm the Sixth Circuit's decision, and affirm that a parent corporation may not be held liable under CERCLA section 107(a)(2) as an "operator" of a facility owned or operated by a subsidiary corporation absent the existence of circumstances warranting piercing the corporate veil under applicable state law.

Respectfully submitted,

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